The Florida Senate

Interim Project Report 2005-202 *November 2004*

Committee on Children and Families Senator Walter "Skip" Campbell, Jr., Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 741.3165, RECORDS HELD BY A DOMESTIC VIOLENCE FATALITY REVIEW TEAM

SUMMARY

Section 741.3165, F.S., maintains the confidential or exempt status of any information or records otherwise confidential or exempt from the provisions of s. 119.07(1), F.S., and s. 24(a) of Article I of the State Constitution when this information or these records are obtained by or provided to domestic violence review teams acting in the course of their duties as described in s. 741.316, F.S.

The proceedings and meetings of any domestic violence fatality review team regarding domestic violence fatalities and their prevention, during which the identity of the victim or of the children of the victim are discussed, are exempted from the provisions of s. 286.011, F.S., and s. 24(b) of Article I of the State Constitution.

Staff has reviewed the exemptions pursuant to the criteria of the Open Government Sunset Review Act of 1995 and has determined that the exemptions, with some modification, meet the requirements for reenactment.

Accordingly, staff recommends that s. 741.3165, F.S., be amended to: clarify the scope of the public meetings exemption, to make explicit the authority of the teams to receive confidential information, to protect information developed by the teams, and to ensure that the teams meet the federal definition of entities entitled to receive medical information under federal law.

BACKGROUND

Constitutional Access to Public Records and Meetings

Florida has a long history of providing public access to the records of governmental and other public entities. Currently, section 24(a) of Article I of the State Constitution, provides the right of access to public records, stipulating that "every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer or employee of the state." This right of access to public records applies not only to the legislative, judicial and executive branches of government, but also to counties, municipalities, and districts, as well as each constitutional officer, board, commission, or entity created pursuant to law or this Constitution. The corresponding general law is found in ch. 119, F.S., which requires the custodian of a public record to permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under the supervision of the custodian of the public record or the custodian's designee.[1]

Pursuant to s. 24(c) of Article I of the State Constitution, exemptions may be provided by general law enacted by the Legislature which are based on an expressed statement of public necessity justifying the exemption and which are no broader than necessary to accomplish the purpose of the law.

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a process to create and maintain exemptions to the requirements relating to access to public records. The process sets forth criteria that must be met and considered in a legislative review to be sufficiently significant to override the public policy of access to executive branch government records. In addition, exemptions granted pursuant to

s. 119.15, F.S., are repealed on October 2nd of the fifth year after enactment of the exemption, unless the Legislature reenacts the exemption.

In considering the creation or continuation of an exemption, s. 119.15(4)(b), F.S., requires that the exemption serve a public purpose. The public purpose served by this exemption must be sufficiently compelling to prevail over the public policy of open government and must not be accomplishable without the exemption. The exemption authorized must not be broader than is necessary to meet the public purpose. The public purpose served by the exemption must meet one of the following purposes as set forth in s. 119.15(4)(b), F.S.:

"1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace."

The Legislature is to consider, in determining whether to exempt or to make public certain records, if damage or loss as specified in the latter two purposes above would occur with making the records public.[2]

Pursuant to s. 119.15(4)(a), F.S., the Legislature is also required to consider, as part of the review process prior to the scheduled repeal, the following questions:

"1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?"

The exemption provided pursuant to s. 119.15, F.S., must allow for the greatest public access to the records as is possible while meeting the purpose of the exemption. The language of the exemption must be uniform and clearly specify the section of Florida Statute from which it is exempt. Finally, s. 119.15(4)(e), F.S., provides that neither the state or other public bodies can be made a party to a suit or incur liability as a result of the repeal or reenactment of an exemption.

Public Disclosure Exemption for Domestic Violence Review Teams

Domestic violence is statutorily defined as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member," s. 741.28(1), F.S.

According to Florida Department of Law Enforcement (FDLE) statistics, a total of 120,697 incidents of domestic violence were reported to law enforcement in Florida in 2003. The rate of such incidents per 100,000 people is at an all-time low of 707.0, having declined steadily from the highest rate of 926.9 reached in 1995. Of the 120,697 offenses, 179 were murders and another eleven were classified as manslaughter, totaling 190 deaths.

As of November 2003, approximately 27 states and the District of Columbia conducted or planned to conduct some sort of domestic violence fatality review. In slightly more than half the jurisdictions, the teams were established statutorily.[3]

Domestic violence fatality review teams were originally established in Florida in 1997 by the Governor's Task Force on Domestic Violence with funding from the Violence Against Women Grants Office of the U.S. Department of Justice. The Governor's Task Force selected four jurisdictions to create local fatality review teams: Miami/Dade County, Tampa/Hillsborough County, Palm Beach County, and Volusia/Putnam Counties. Subsequently, the Task Force received funding to create six additional teams.

In the 2000 legislative session, the Florida Legislature authorized the creation of domestic violence fatality review teams statewide, s. 741.316, F.S. Paired with the creation of the teams was an exemption from disclosure of confidential information gathered by the teams, s. 741.3165, F.S.

The Legislature outlined the purpose of the domestic violence fatality review teams as "to learn how to prevent domestic violence by intervening early and improving the response of an individual and the system to domestic violence," s. 741.316(2), F.S.

At the time the teams were legislatively authorized, the Legislature granted them immunity from liability for "any act or proceeding undertaken or performed within the scope of the functions of the team" unless the act or proceeding was undertaken in bad faith, s. 741.316 (3), F.S. Additionally, information gathered by the teams is protected from discovery and introduction into evidence in civil proceedings, and persons attending team meetings are prohibited from testifying in civil or disciplinary actions regarding records or information produced or presented to the team, s. 741.316(6), F.S.

Each team is charged with the responsibility of collecting data regarding domestic violence on a form determined by FDLE. FDLE is then required to prepare a report to the Legislature, the Governor, and the Chief Justice of the Supreme Court using the data provided by the teams. This report is due on July 1 of each year, s. 741.316(3), F.S.

Since the 2000 legislation only authorized the creation of the teams rather than requiring their creation, and since no funding source accompanied the authorizing legislation, the growth of the teams has not been substantial. In fact, by 2004, only thirteen teams were active in Florida. Of these, ten submitted the required data forms to FDLE for inclusion in its 2004 report. The total number of cases submitted was 53.

The introduction to the 2004 FDLE report, as in previous years, contains the following cautionary language:

"This report is not meant to statistically represent all domestic violence deaths in Florida. The cases reviewed for this annual report were independently selected by the fatality review team members and occurred during different years…. (C)aution should be taken before attempting to generalize or draw conclusions about state policy based on this limited and unscientific sample…."

Specific actions noted by FDLE to have been implemented in communities with active teams as a result of cases reviewed in 2004 included:

- Continuation of lethality training with the justice system and community social services agencies;
- Linkage of family members to needed services;
- Establishment of a Domestic Violence University designed to train court personnel on domestic violence issues (Miami/Dade);
- Creation of a model policy for first responders (Broward County);
- Initiation of follow-up hearings at 30 and 75 days for domestic violence injunctions (Duval County);
- Onset of reviewing near-fatality cases (Orange County);
- Re-establishment of the Domestic Violence and Sexual Assault Council (Lee County); and
- Provision of responses to newspaper articles regarding domestic violence cases (Palm Beach County).

In addition, team leaders have identified improved communications among professionals and greater sensitivity to domestic violence issues in the communities at large resulting from the work of the teams.

METHODOLOGY

The research for this project included reviewing the exemption provision and similar provisions both in Florida law and in other states. Relevant professional literature was also reviewed. Stakeholders and all current Florida fatality review teams were provided with a survey instrument and the opportunity to provide information regarding the sunset provision of law. Staff attended the National Conference on Fatality Review Teams held in Delray Beach on September 20-21, 2004, attending presentations and entering into discussions with state and national experts on this topic. Follow-up interviews were conducted with DCF, the Coalition on Domestic Violence, and leaders of two teams. The First Amendment Foundation was also contacted and provided information for the report.

FINDINGS

Respondents to the surveys and interviews uniformly reported that the public meetings exemption has provided the necessary protection so that members can analyze fatalities and near-fatalities in their communities in an atmosphere of full communication

and cooperation. None of the respondents identified any problems in the operation of either the public records exemption or the public meetings exemption.

A review of the statutes of other states addressing similar issues suggests that Florida's statute might be improved through inclusion of a specific authority for the teams to receive the confidential information and a clarification as to the portions of the meetings to be closed. In addition, the passage of the federal Health Insurance Portability and Accountability Act (HIPPA) in 1996[4] and its accompanying Privacy Rules[5] have added some considerations to the sharing of medical information which could be addressed in the statute if it is revised and re-enacted.

Several teams reported that a portion of their duties included interviewing family members and survivors of near-fatal incidents of domestic violence. Since the current statute only maintains confidentiality for information which is confidential when it comes to the team, the personal identifying information in new records created as a result of these interviews does not appear to be protected from disclosure, except for the protection against discovery or introduction into court proceedings found in s. 741.316(6), F.S.

After reviewing the Domestic Violence Fatality Review Team Program and its public records exemption, the questions that must be considered pursuant to s. 119.15(4)(a), F.S., can be answered as follows:

What specific Records or Meetings Are Affected by the Exemption?

The specific records affected by the exemption pertain to persons who are killed or, in some instances, narrowly escape being killed, as the result of domestic violence. Since, at this time, the teams in Florida only review records of closed cases, much of the information is public record. However, the teams report the necessity of reviewing confidential records in order to carry out their duties. These confidential records include:

- Reports to the child abuse hotline and all records generated as a result of such reports;[6]
- Criminal intelligence or investigative information which reveals the identity of a victim of sexual offenses;[7]
- Information relating to persons with sexually transmitted diseases when this information is held by the Department of Health;[8]
- Mental health clinical records;[9]
- Reports of adult abuse made to the central abuse hotline and all records generated as a result of such reports;[10]
- Patient medical records;[11]
- Records of juvenile offenders;[12]
- Medical records and pre-sentence investigative reports of adult offenders;[13] and
- Educational records.[14]

Even under current law, some records are not available to the teams as a result of federal restrictions on information sharing. These include:

- Information relating to substance abuse treatment;[15]
- Information relating to clients of domestic violence centers;[16]
- Military records;[17] and
- Sources of information gathered by news reporters.[18]

Whom Does the Exemption Uniquely Affect, as Opposed to the General Public?

The exemption uniquely affects any surviving family members of victims and perpetrators of domestic violence. Since some teams also review near-fatalities, the victims and families of such near-fatalities are also affected.

What is the identifiable Public Purpose or Goal of the Exemption?

The goal of the exemption is to enable the teams to protect the privacy of information relating to family members of victims of domestic violence and survivors of near-fatal episodes of domestic violence.

The exemption allows the teams to complete their work in candor, encouraging the free and full flow of communications among team members. According to survey respondents, without the exemption, many teams would be hampered in their ability to perform their work, and some would simply cease to exist.

Can the Information Contained in the Records be Readily Obtained by Alternative Means?

While much of the information reviewed by the teams is public record and thus readily available to the teams by alternative means, the information in records identified above as confidential could not be obtained by alternative means.

Continued Necessity for the Exemption

The exemption protects the privacy of domestic violence victims and their family members. It allows the free and open discussion of these cases by statutorily-created teams with the purpose of improving practice and decreasing domestic violence fatalities. Survey respondents reported that their effectiveness would be critically impacted and that some would cease to exist if the exemption were not in place.

Can the Exemption be Narrowed?

The scope of the public meetings exemption has been interpreted in varying ways by teams, with some closing the entire meeting and others closing only those portions which deal with identifying information about specific victims and their families. Clarifying that the meeting exemption only applies to the portions of the meeting in which identifying information is discussed would result in a narrowing of the exemption.

The exemptions provided for in s. 741.3165, F.S., generally meet the criteria set forth in s. 119.15(4), F.S., for reenactment. However, modification is needed to the language to clarify that the public meetings exemption applies only to those portions of the task force meetings in which identifying information relating to particular individuals is discussed, to make explicit the authority of the teams to receive confidential information, to protect personal identifying information in records created by the teams, and to ensure that the teams meet the federal definition of entities entitled to receive medical information under federal law. These revisions will result in substantial amendment to the exemption and, pursuant to s. 119.15(3), F.S., will require another sunset review in five years. The protection of information developed by the teams is also an expansion of the exemption, requiring a statement of public necessity and passage by a two-thirds majority of the legislature.[19]

RECOMMENDATIONS

Staff recommends that the exemptions contained in s. 741.3165, F.S., be reenacted and modified to clarify that the public meetings exemption applies only to those portions of the task force meetings in which identifying information relating to particular individuals is discussed, to make explicit the authority of the teams to receive confidential information, to protect personal identifying information in records created by the teams, and to ensure that the teams meet the federal definition of entities entitled to receive medical information under federal law.

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[1] Section 119.07(1), F.S.
[2] Section 119.15(4)(c), F.S.
[3] Websdale, Neil, *Reviewing Domestic Violence Deaths*, NIJ Journal Issue No. 250, November 2003, p. 28.
[4] Pub.L. 104-191 (August 21, 1996)
[5] 45 C.F.R. Parts 160 and 164 (Effective date: April 14, 2003)
[6] s 39.202, F.S.
[7] s. 119.07(6)(f), F.S.
[8] s. 384.29, F.S
[9] s. 394.4615, F.S.
[10] s. 415.107, F.S.
[11] s. 456.057, F.S.
[12] s. 945.04, F.S.
[13] s. 945.10, F.S.
[14] s. 1002.22(3)(d), F.S.
[15] 42 USCA s. 290dd-2
[16] 42 USCA s. 10402(a)(2)(E)
[17] 5 USC 552(a) and (b)(6)
[18] U.S. Constitution, Amendment 1
[19] Florida Constitution, Article I, Section 24(c).